United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7187

United States Court of Appeals
For the Second Circuit

B

P/S

DOCKET NOS. 77-7187; 77-7271, 77-7273

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, in behalf of its membership affected and in behalf of Classes involved herein, GARY MICHAEL, MICHAEL FAGAN and MARTIN F. RANDOLPH, JR., individually and as Class Representatives, and in behalf of all other parties similarly situated and circumstanced,

Plaintiffs,

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL and MICHAEL FAGAN,

Plaintiffs-Appellants,

I. WALTON BADER,

Appellant,

-against-

TELEPROMPTER CORPORATION, TOUCHE ROSS & COMPANY, HERBERT SCHLAFLY, WILLIAM BRESNAN, MARVYN CARTON, "JOHN DOE" and "RICHARD ROE", the names "JOHN DOE" and "RICHARD ROE", being fictitious, the parties intended being those persons, firms, corporations and associations involved in the unlawful acts involved herein,

Defendants,

TOUCHE ROSS & CO.,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
AUG 8 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

HARRY LEWIS, et al.,

Plaintiffs,

-against-

TELEPROMPTER CORP., et al.,

Defendants.

Consolidated Appeal

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

PRELIMINARY STATEMENT PURSUANT TO RULE 28 OF THIS COURT

The present appeal is taken from an Order of Hon. Richard Owen, who is one of the Judges of the United States District Court for the Southern District of New York. The appeal is also taken from the Orders which preceded the Order appealed from and upon which the Order is based.

The Order appealed from, while intermediate insofar as this action is concerned, is final pursuant to the provisions of Rule 54(b) FRCP. The Order was made on May 6th, 1977 and was based on a Memorandum Decision of Judge Owen of March 4th,1977 (amended sua sponte by the District Court on March 11th,1977.)The order was preceded by an Order and Memorandum of December 28th,1976 which denied a Motion made by the Appellants under Rule 60(b) to vacate a prior Order and Opinion of Judge Owen of January 9th,1976 (erroneously listed as January 19th,1976 in the Court's Memorandum). Also brought up for review by this appeal is a prior Order of Judge MacMahon of December 8th,1976 which vacated the "so ordered" provision placed thereupon on prior Notices of Voluntary Dismissal of this action filed by Appellants.

This action was commenced on September 13th,1973 and consolidated with seven (7) actions brought by various other plaintiffs on November 15th,1974. Class certification of a class far more limited than the Class sought by Appellants

was granted, without opposition, by Judge MacMahon on September 23rd,1975.

A prior appeal was taken to this Court from the Order of Judge Owen of January 9th,1976. The appeal was dismissed by the Court as taken from an intermediate non-appealable order. The decision of this Court was officially reported in 542 Fed. (2nd) 156. None of the other determinations appealed from herein have been officially reported.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Appellants contend that the determinations appealed from herein are erroneous and should be reversed. The controlling principles of law applicable to this case and relied upon by Appellants are as follows:

1. The Order of the District Court requiring further answers to interrogatories was complied with within the time required by the Court with respect to all parties to this suit at the time of the Order. Hence the District Court committed error in granting Rule 37 relief against the Appellants and dismissing the Complaint with sanctions against Appellants IIPL and Appellants' Attorney I.WALTON BADER.

2. The determination as to whether the Order was, or was not complied with, is a matter of New York State Law and not Federal Law. Rule 33 provides that answers to interrogatories are utilizable at a trial to the extent permitted by the Rules of Evidence. The Rules of Evidence in effect at the time for compliance were set forth in Rule43(a)

FRCP. This Rule then provided that evidence was to be admitted in accordance with the more favorable of Federal Rules or Rules of Evidence applied in the Courts of General Jurisdiction in the State where the District Court was held. Thus New York State Rules apply to the interrogatory answers questioned herein and since these answers were fully in accord with such rules Rule 37 relief was not warranted in this case.

3. Assuming, arguendo, that compliance was not made until the time when fully formal answers of all parties were submitted to the Appellee's attorney, the record amply demonstrates that there was no wilful failure to make discovery but rather a desperate effort to comply with the Court's Order in time. Since no prejudice to Appellee has been shown by the alleged late compliance with the Court's Order Rules 37 relief was inappropriate in this case.

4. The evidence before the District Court did not show that Appellants' Attorney gave any "false testimony" or made any "false statements". Even if, arguendo, the facts were slightly different than testifed to by Appellants' witnesses, the discrepancies were immaterial to the issues in this case. Furthermore much of the so-called "testimony" was not testimony at all. A finding that much of the matters involved herein was "testimony" would subject the attorneys on both sides to claims of violation of EC 5-9, EC 5-10 and DR 5-102 of the Judiciary Law of the State of New York relating to conduct of attorneys.

5. Appellee, even if it would have been normally entitled to relief in this proceeding under Rule 37 FRCP (to which it is not) would be barred under the doctrine of "unclean hands" for having filed an admittedly false affidavit with the Court and having failed to explain the reason for the disappearance of a vitally important piece of evidence (the large envelope in which certain interrogatory answers were mailed).

6. Since Appellee's attorney LAWRENCE R. ENO was a witness before Judge Owen at hearings that he solicited, and appeared as such witness voluntarily both he and his firm are disqualified from representation of his client under EC 5-9 and EC 5-10 as well as DR 5-102 of the Judiciary Law of the State of New York relating to the conduct of attorneys. Thus, in any event, an award of expenses and counsel fees to his firm is not warranted.

7. In this case the District Court had no jurisdiction to award attorneys' fees and expenses to the Appellee or to dismiss the Complaint with prejudice since prior to the date of such award Notices of Voluntary Dismissal of the action were filed by Appellants with the Clerk of this Court, and the Court had no further jurisdiction.

8. Appellee's attorney failed to disclose to Appellants his prior personal acquaintance with the District Judge nor his prior service on the Committee on the Judiciary of the Association of the Bar of the City of New York before whom the District Judge appeared for an

interview shortly prior to his appointment. The interview occurred within the year prior to the hearings held in this matter where the credibility of the witnesses, including the credibility of the Appellee's attorney was at issue. The failure of the Appellee's attorney to disclose these facts is a violation of EC 9-6 of the Judiciary Law of the State of New York. At the very least this conduct on the part of Appellee's attorney should bar him from obtaining any benefits therefrom.

9. The subsequently disclosed facts with relation to the personal acquaintance of the Appellee's attorney with the District Judge should have caused the District Judge to promptly recuse himself in this matter. Having failed to do so all actions taken by him are void.

10. Even if, arguendo, an award of attorneys' fees and expenses to the Appellee was warranted (which it is not) the Court committed reversible error in failing to hold a hearing on the amount of such expenses or to grant pre-hearing discovery to the Appellants with respect to such issue.

11. Since a Jury Demand was placed in this action by the Appellants and determination of the Rule 37 application involved factual issues, the Court could not determine such issues in the absence of a jury.

STATEMENT OF THE CASE

The District Court, by Order, granted Rule 37 relief to the Appellee upon the alleged ground that the Appellants had not complied with an Order requiring them to submit further answers to interrogatories within 20 days. The District Court further found that the Appellant IIPL (through its Secretary SANDS)and its general counsel BADER had made "false statements" to the Court and had given "false testimony". The basis for this finding appeared to be that service of copies of interrogatory answers had been made at a time when the originals were not in the possession of the Appellants' attorneys.

The District Court then, without a hearing, awarded attorneys fees and expenses to the Appellee in the sum of over Eight Thousand ($8,000) Dollars.

Prior to the determinations of the District Court Appellants filed Notices of Voluntary Dismissal with the Clerk of the Court. These notices were subsequently "so ordered" by the District Court. Later on the "so ordered" provisions of the notices were struck by the District Court after a substantial change of position had taken place by reason of the reliance thereupon.

This Court, in a prior decision, dismissed a prior appeal on the ground that it was premature. Thereafter

Appellants sought Rule 60(b) relief from the Court which application was denied. The District Court, in awarding attorneys'fees and expenses to Appellee made its order final under Rule54(b) so as to permit an immediate appeal of the propriety thereof.

FACTS

This action, commenced as a Class Action, was one of seven (7) substantially similar actions brought against the defendants. Appellee, TOUCHE ROSS & CO. is one of a number of defendants. The actions were consolidated on November 15th,1974 and Class Certification was granted, without opposition, on September 23rd,1975. The consolidated action remains undetermined at the present time and depositions have not yet been completed.

Appellants commenced their action on September 26th, 1973 (JA A-17). On October 31st,1974 a set of interrogatories were sent to the Appellee TOUCHE ROSS(JA 369), the interrogatories were never answered and on Jan.8th,1974 a letter was sent to Judge Griesa (who had charge of the case at that time, commenting on this fact (JA396). Judge Griesa had heretofore dismissed the Appellants' Complaint but with leave to amend in all respects. An amended complaint was thereafter filed. After filing of the Amended Complaint, despite the fact that defendant TOUCHE ROSS had not answered the open interrogatories of the plaintiffs, it obtained an Order from Judge Owen (to whom the case had been re-assigned), on February 13th,1974,

extending its time to move to dismiss the amended complaint until "a reasonable time until the interrogatory answers were served". Judge Owen granted the Appellee 30 days after the date of service of the answers to the interrogatories. Thus, by the Appellee's own act, the time for answers on the part of the Appellants was indefinitely extended(JA 439).

Answers to the Appellee's interrogatories were duly served on July 11th,1974 (JA 429).

On August 2,1974 Appellee moved for further answers to the interrogatories. It made various objections to the answers already served. It complained that, although it had only served one set of interrogatories, it required responses from all of the plaintiffs and not only from IIPL. It also claimed that the membership list of IIPL was inaccurate and required a revised list.(JA 402).

The motion was opposed by Appellants stating the following :

> " * * While it is not necessary for the Plaintiffs to individually answer the interrogatories with respect to stock holdings, in the present form * * *The undersigned has written to the Plaintiffs but has not received answers from them. Annexed to this affirmation is a form letter which has been sent to such plaintiffs. Accordingly, such information will be supplied with respect to each individual plaintiff, provided the undersigned is given sixty (60) days from the Date of this Affirmation to comply.* * *" (JA 447).

At the time of the motion, the amended complaint had withdrawn the name of GARY MICHAEL as a plaintiff and the plaintiffs in the case were INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH,JR. and MICHAEL FAGAN, however, since the names of GARY MICHAEL and MICHAEL FAGAN were similar there was confusion as to this point.

Anticipating the necessity for obtaining this information the Appellants' attorney had, even prior to the return date of the motion involved, written to the individual plaintiffs to obtain this information.

The individual plaintiffs were, of course, non-residents of New York. One lived in Vermont, one in Connecticut, and one in California. Had the Court granted the sixty (60) days requested t problems involved in this suit would never have arisen. This period of time would have been ample to have supplied all of the information requested. However the Court, for reasons best known to itself, granted Appellants only twenty(20) days to comply with the Order. (JA 454).

Not only were there problems involving communications with the plaintiffs in this action but Appellants' attorney had office problems as well. He and his partner SCHER were about to part company. His personal secretary, DOROTHY BLACKER,was being dismissed within a few months and had already received notice of this fact. The secretary of the IIPL SANDS was moving

from Danbury Connecticut to Florida. The secretary of SCHER had poor eyesight and had to peer at the addresses of letters in order to indentify the receipient.Both the plaintiff MICHAEL FAGAN and GARY MICHAEL had moved from their residences to new locations.

Since the time necessary to comply with the Order of the Court with respect to further interrogatory answers was short, prompt requests for information were made on August 15th, 1974 (JA 467,468). These requests were answered about August 29th,1974. Promptly upon receipt of this information draft interrogatory answers were prepared and mailed to the plaintiffs RANDOLPH and FAGAN and to GARY MICHAEL. Plaintiff RANDOLPH signed the answers involved on September 3rd,1974 (JA 516) and deposited these answers in a post-office in San Diego California at about noon of September 3rd,1974 and mailed the answers to Appellants' attorney VIA AIR MAIL.(JA623,624). By normal postal standards these answers should have reached the Appellants' attorney's office on the first delivery of September 5th,1974.

Plaintiff FAGAN signed the draft answers on August 30th,1974 and promptly mailed them to Appellants' attorney. These answers should have been received long prior to September 5th,1974.

Plaintiff IIPL (through its Secretary SANDS) signed answers to interrogatories on September 5th,1974. The copies mailed (although the jurat was inadvertently omitted) were actually signed by Sands.

GARY MICHAEL did not sign interrogatory answers on September 5th,1974. He, of course, was not a plaintiff after the service of the Amended Complaint which eliminated him from the action. However he did supply interrogatory answers which he signed on September 16th,1974. A motion for extension of time for compliance made on September 11th,1974 (only 3 days after expriation of the time for compliance) was denied by the District Court.

Service of answers of the plaintiff IIPL was made upon all of the attorneys for the defendants on September 5th, 1974. The service copy, while the jurat was inadvertently omitted, bore the actual signature of MERRILL SANDS, Secretary of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE. Also, on September 5th,1974 unsigned copies of the interrogatory answers of the plaintiffs RANDOLPH and FAGAN and of GARY MICHAEL were sent by the Secretary of the IIPL, Sands, solely to the Appellee's attorneys. Much has been made,by the District Judge, as to whether these latter copies were sent inadvertently or deliberately in an attempt by the Appellants' attorney to deceive. The question involved is probably immaterial for the reasons subsequently set forth. However, since the District Judge spent much time on this question it will be fully explored.

RANDOLPH mailed the original signed interrogatory answers at 12 noon on September 3rd,1974. These were clearly executed on that date since the notarial acknowledgement so

states. The normal mail delivery time from the conceded time that the answers were placed in the post office and the addressee's office is two days as certified by the United States Postal Service (JA 227a, b, Plaintiffs' Exhibits 1, 1a and 2). The LaPorta Affidavit (JA 671) indicates the reason for the time discrepancy between the claimed time of mail delivery by Appellants' attorney and the actual time of mail delivery as set forth by the postal records. Thus, at least with respect to RANDOLPH, there was compliance with the Court's Order and Rule 37 sanctions were inappropriate.

The FAGAN answers should have been received by Appellants' attorney long prior to September 5th,1974. At least it is uncontroverted that they were signed by FAGAN prior to that date. The answers of GARY MICHAEL were, of course, not received on September 5th,1974 but,since he was not a plaintiff in the action at that time, this is immaterial. However, in order to clarify the record, GARY MICHAEL has ratified, in all respects the answers served on September 5th,1974. (JA 745); (JA-742-744).

In any event, in accordance with the usual practice between normal professional attorneys, the Appellants' attorney, not knowing that draft copies of interrogatory answers had been served on the Appellee's attorneys, telephoned him on September 9th,1974 and informed him that he would send photo-copies of the original answers within a few days. This telephone call is confirmed by the Appellee's attorneys own records (JA 335, TR EXHIBIT H).

Again, on September 10th,1974, Appellants' attorney, not knowing that copies of the answers had already been sent to Appellee's attorney, again informed said attorney that he was going to be late and, by reason thereof, would extend the time for Appellee to answer the Amended Complaint for a period of from 2 1/2 to three weeks. (JA 339 TR Exhibit J). This, again, was confirmed by Appellee's attorneys own records.

The reason for the lack of knowledge on the part of Appellants' attorney was the fact that on September 7th,1974 said attorney was in St. Louis Missouri and on September 9th and 10th,1974 he was in Washington DC (JA 228 Plaintiffs' Exhibit 3 --hotel records). Also, on September 10th,1974 he was in depositions in New York where about five other attorneys were in attendance.

On September 11th,1974 Appellants' attorney ~~discovered~~ disclosed the circumstances with respect to the answers involved. He exhibited to the Appellee's attorney the original signed answers of IIPL and of RANDOLPH. He wrote to GARY MICHAEL and to MICHAEL FAGAN with respect to said answers. (MICHAEL subsequently submitted answers and ratified the originally served answers), FAGAN subsequently ratified the originally served answers and, in addition, executed a nunc pro tunc Power of Attorney in favor of Appellants' attorney. Similar Powers of Attorney nunc pro tunc were executed by RANDOLPH and IIPL.

Without complying with the Local Rules of this Court requiring, that where discovery motions are made, the party making such motion must confer with the adverse party in an

attempt to resolve differences, Appellee's attorney made a Rule 37 motion (JA 470,et.sq). In connection with this motion the Appellee's attorney made an admittedly false affidavit reading as follows:

> "* * *That letter contains a number of misstatements. Analysis of those misstatements simply confirms that there was in existence a deliberate effort to mislead counsel and the Court. Thus:
>
> (a) In his letter of September 11th,1974 Mr. Bader suggests that the copies of the purported answers of the individual plaintiffs were "inadvertently" mailed to us on September 5th by some unnamed person in his office. The fact is that those purported answers arrived in the same envelope with the answers of IIPL. Appended to the answers of IIPL was a certification that on September 5,1974 he mailed the copies of IIPL's answers to all attorneys (Exhibit G).The mailing was thus apparently by Mr. Bader and not by someone in his office.The excuse of "inadvertence" is thus without substance. * * *" (Emphasis supplied).

If, of course, the affidavit involved herein were true, then, of course, Appellants attorney would have been guilty of a deliberate falsehood. This affidavit was not admitted to be false until the "tail end" of hearings held by the District Judge and, of course, had already had its intended effect.

After argument of the motion on September 20th,1974, on the request of Appellee's attorney, the District Judge held hearings pursuant to a Notice submitted by the Appellee's attorney. The Notice set forth the scope of the hearing as

" * * *the circumstances relating to

> the service on September 5th,1974 of purported answers by plaintiff Martin F. Randolph,Jr. to interrogatories dated November 1,1973 propounded by defendant Touche Ross & Co.* * *" (JA 592,593).

At the commencement of the hearings when the District Judge set forth the scope thereof, Appellee's attorney reiterated that the hearing was "the circumstances under which this purported answers to interrogatories of the plaintiff Randolph received."(JA 2).

Prior to the date set forth the hearings, on October 9th and October 28th,1974, Notices of Voluntary Dismissal were filed in the office of the Clerk of the District Court.

At the conclusion of the hearings the Court, on January 9th,1976, issued its Order and Opinion granting Rule 37 relief to the Appellee, castigating the Appellants' attorney severely, recommending disciplinary action against said attorney for alleged "false statements" and "false testimony" and providing for a determination of fees and expenses to be paid by the plaintiffs IIPL and their attorney BADER by an exchange of affidavits.

Subsequent to the dismissal of the prior appeal in this action (and this Court's dictum to the effect that the District Court may not have jurisdiction in the matter because of the filing of Notices of Voluntary Dismissal) a Rule 60(b) application was made. Fortuitously, at about the same time, Appellants' attorney received an annonymous telephone call

revealing, for the first time, possible grounds for recusal of the District Judge. It was belatedly revealed to the Appellants' attorney that the Appellee's attorney had served as a member of the Judiciary Committee of the Association of the Bar of the City of New York and that District Judge Owen had appeared before that body for an interview on his qualifications for appointment as a District Judge and that this took place about a year before the hearings before the District Court in this case. It was also belatedly revealed that the District Judge and the Appellee's attorney had met socially on a number of occasions.

The District Judge declined to recuse himself in the matter, denied Appellants' request for a hearing on the amount of attorneys' fees to be fixed for alleged Rule 37 violations, and granted Appellee's motion to strike a Notice of Taking Testimony for pre-hearing depositions and quashed a Subpoena Duces Tecum. He then granted over Eight Thousand ($8,000) Dollars in attorneys' fees and expenses to Appellee and made the judgment effective immediately under Rule 54(b). He also dismissed the Complaint, with prejudice, against the defendant TOUCHE ROSS. This appeal followed.

POINT ONE

THE ORDER OF THE DISTRICT COURT OF AUGUST 16th, 1974 WAS IMPROPER IN GRANTING INSUFFICIENT TIME FOR COMPLIANCE. THE DISTRICT COURT FURTHER HAD NO RIGHT TO REQUIRE INDIVIDUAL ANSWERS TO INTERROGATORIES BY ALL PLAINTIFFS.

Answers to interrogatories are governed by Rule 33 FRCP which reads in part as follows:

> " * * * Any partymay serve upon any other party written interrogatories to be answered by the party served, or, if the party is a * * *association, * * by any officer or agent * * * The answers are to be signed by the person making them. The party upon whom the interrogatories have been served shall serve a copy of the answers * * *within 30 days after the service of the interrogatories * * The court may allow a shorter or longer time.* * *"(emphasis supplied).

In the present case, had the District Court granted the normal 30 days provided in Rule 33 for further answers to be served, compliance with the Court's order would have been made without question. It is conceded that properly verified answers to interrogatories of the IIPL and of RANDOLPH were exhibited to the attorneys for the Appellee by September 11th 1974. Also, by September 16th,1974 properly executed interrogatory answers of GARY MICHAEL were also served. The additional 10 days would have been more than sufficient to obtain duplicate originals of the answers executed by MICHAEL FAGAN on August 30th,1974.

While the Court has discretion, of course, to either shorten or lengthen the normal 30 day period involved the discretion is not properly exercisable under the facts of this case. Where all plaintiffs are non-residents of the State of New York, and reside in Connecticut,Vermont and California, and where communication has been by mail, the 30 day period

for response should have been granted. The failure of the District Court to grant such period for response is an abuse of discretion and should be overruled by this Court.

In addition, the Court was in error in holding that individual responses to one set of interrogatories was required. Rule 33 provides for service of interrogatories upon a party. Where multiple parties are involved and an adverse party desires separate answers from each party he must serve separate sets of interrogatories upon each party from whom he desires an answer. Otherwise he will only receive answers from one of the parties involved.

To require otherwise would subject a party to a Rule 37 application for failure to answer interrogatories merely because he has submitted answers by one party only. In a multi-party suit such a result would be a denial of justice.

POINT TWO

GARY MICHAEL, NOT BEING A PARTY AT THE TIME OF THE MAKING OF THE COURT'S ORDER OF AUGUST 16th,1974, COULD NOT BE COMPELLED TO ANSWER INTERROGATORIES AND HIS FAILURE TO SO DO CANNOT BE THE SUBJECT OF RULE 37 RELIEF

It is conceded that, prior to the making of the Court's order of August 16th,1974, a prior Complaint was dismissed by Judge Griesa with leave to the plaintiffs to amend the Complaint in any respects required. An Amended Complaint was served on January 3rd,1974 and was included by the Appellee in its motion of August 2nd,1974 which resulted in the Order of August 16th,1974. (JA 386,etc). It is conceded that the caption

of the Amended Complaint reads as follows:

> "INDEPENDENT INVESTOR PROTECTIVE LEAGUE, an unincorporated membership association, in behalf of its membership affected, MARTIN F. RANDOLPH, JR. and MICHAEL FAGAN, individually, said parties suing in their own behalf and in behalf of the Classes involved herein similarly situated and circumstanced,
>
> Plaintiffs
>
> * * * "

GARY MICHAEL is, of course, not listed as a plaintiff in the Amended Complaint. While this is conceded by the Appellee it claims that a party to an action cannot be dropped except by specific order of the Court pursuant to Rule21 FRCP, which provides that parties may be added and dropped by the Court at any time. This is not the Rule in this Circuit. Even in the absence of a Court Order, if a party seeks to amend his Complaint, as of course, without a Court Order, he can drop a party. Kerr vs. Compagne de Ultramar 250 Fed(2nd) 860,864 (2nd Cir.) is illustrative of the Rule here. This Court has held that where a party is dropped, not because of mis-joinder or non-joinder but for other reasons it is considered to be an amendment of the pleadings under Rule 15(a), the Court holding as follows:

> "* * *The motion is more properly an amendment of the pleadings under Rule 15(a) which would result in a dismissal of the Complaint against Transmar * * *"

The Rule in other circuits, where amendment of the pleadings has not been granted by leave of court, is divided.

However the weight of authority among the circuits seems to be that the dropping of a party, where it is not done because of misjoinder, is governed by Rule 15(a) and not Rule 21. This is the Second Circuit Rule and also has been followed in McLellan vs. Mississippi Power & Light Co., 526 Fed(2nd) 870 (5 Cir. 1976). District Court cases following the Rule of this Circuit are Bransted vs. Schmidt, 324 Fed. Supp. 1232 (WD WIS. 1971); Jones vs.Electrodyne Co. 224 Fed. Supp. 599 (WD Mo. 1963); and U.S. vs. Sinclair, 347 Fed. Supp. 1129 (DC Del. 1972).

Since the granting of the leave to amend, however, in this case was by the Court without conditions, and since it is conceded that GARY MICHAEL was dropped as a party by the Amended Complaint, there was no obligation on his part to answer interrogatories and the Order of the District Court to that effect was in error. A non-party cannot be required to answer interrogatories. See, for example, Ju Shu Cheung vs. Dulles, 16 FRD 550 (1954); Leonia Amusement Corp. vs. Loews,Inc., (DCSDNY), 21 Fed. Rules Serv.(2nd) 467 (1955); Holland vs. Minneapolis-Honeywell Regulator Co. 28 FRD 595; Steelman vs. US F & G Co., 35 FRD 116 (1964); and Wainwright vs. Kraftco Corp. 54 FRD 532 (1972).

The circumstances with respect to the answers of GARY MICHAEL are thus immaterial in this action and the finding of the District Court that interrogatories of this individual were not served in time are not supportable.

POINT THREE

THE ORDER OF THE DISTRICT COURT REQUIRING FURTHER ANSWERS TO INTERROGATORIES WAS COMPLIED WITH WITHIN THE TIME REQUIRED BY THE COURT WITH RESPECT TO ALL PARTIES TO THE SUIT AT THE TIME OF THE ORDER. HENCE THE DISTRICT COURT COMMITTED ERROR IN GRANTING RULE 37 RELIEF AGAINST THE APPELLANTS AND DISMISSING THE COMPLAINT WITH SANCTIONS AGAINST APPELLANTS IIPL AND APPELLANTS' ATTORNEY

It is conceded that, with respect to the answers of the plaintiff IIPL and the plaintiff RANDOLPH, that properly and fully verified answers were exhibited to the Appellee's attorney on September 11th,1974. Thus, at least on that date, fully and formally verified answers were delivered. It is further conceded that, prior to the award of attorneys' fees by the Order of the Court on May 6th,1977, duly conformed copies of fully verified interrogatory answers were filed by the plaintiff FAGAN in this Court. It is further conceded that the fully verified answers of the plaintiffs herein conformed, in all respects to the copies served on the Appellee's attorney on September 5th,1974.(JA 728-730,).

It must also be conceded, since the testimony to that effect is uncontroverted, that on August 30th,1974 MICHAEL FAGAN signed interrogatory answers identical to the copies served upon the Appellee's attorney on September 5th,1974. It must also be conceded, and an inspection of the pages of JA 517) (showing the signature of Merrill Sands on the duly verified copies of his interrogatory answers) and of (JA 232)

(showing the signature affixed to the copy of the interrogatory answers concededly served upon the attorneys for Appellee on September 5th,1974) that SANDS did, in fact, sign the answers on September 5th,1974. It must further be conceded that RANDOLPH signed his interrogatory answers of September 3rd,1974 (JA 516) since the notarization is by a California Notary. Thus the question boils down to whether the mere informality of the actual answers served (which caused concededly no prejudice to the Appellee) causes the answers to be late and subjects the plaintiffs to Rule 37 sanctions.

In determining this question both Federal and State Law must be considered (the applicability of State Law will be discussed in the following point). Federal Law is determined by Rule 61 FRCP which reads in part as follows:

> " * * * The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.* * *"

Applying Rule 61 strictures to the issues in the present case we find the following:

1. Formally duly verified answers to interrogatories made by all plaintiffs at the time of the August 16th,1974 order have been filed in this case.

2. The answers are in all respects in conformance with the copies of answers served on Sept. 5,1974.

3. No prejudice has been shown by the Appellee by reason of these facts.

4. With respect to the RANDOLPH, FAGAN and IIPL answers originals had been signed by these parties (in all respects identical to the copies served on September 5th,1974) prior to that date.

5. On September 11th,1974 fully formally signed and verified copies of interrogatory answers of IIPL and RANDOLPH were given to the Appellee's attorney.

While cases in the Federal Courts under Rule 61 are many and varied they generally apply to specific factual situations and thus are not authority except as to their specific facts. However Jones vs. Goldstein, 41FRD 271 is illustrative. In that case, contrary to the facts in this case, the interrogatories were separately addressed to the defendant HYMAN GOLDSTEIN and to the defendant A & H Transportation,Inc. Separate sets of interrogatories were served upon each of the defendants. The answers were signed by the attorneys for the defendants.

Since the State Rules, in that case, did not permit signature by attorneys to interrogatory answers addressed to a party the Court required that (274):

> " * * *the defendant Goldstein is hereby required forthwith to respond to said interrogatories under his own signature.* * *"

Applying the Goldstein rule to the case at Bar, therefore, and even assuming,arguendo, that answers to

interrogatories were not signed by September 5th,1974 the parties would have been given a reasonable time (and September 11,1974 is certainly a reasonable time) to supply formally signed answers.

However, in the case at Bar, the facts are even stronger. Since the order of the District Court was made on August 16th,1974 and notice of the entry of the order was given by mail by the Clerk of the Court, three additional days are granted for compliance. Rule 77(d) FRCP sets forth the "notic requirements of Orders as follows:

> "* * * Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail * * upon each party.* * *"

Three additional days for compliance with any order are granted where the notice is served by mail as follows:under Rule 6(e) FRCP:

> " * * * Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period * * *"

Where a Sunday intervenes,however,additional time is granted under Rule 6(a) FRCP as follows:

> " * * * The last day of the period so computed shall be included, unless it is * *a Sunday ** in which event the period runs until the next day which is not a Sunday * * *"

Twenty days from August 16th,1974 would expire on September 5th,1974. Adding three days to this period would cause the term to expire on September 8th,1974. But September 8th,1974 was a Sunday and thus the time period would not have expired until September 9th,1974. However,of course, it is conceded that on that date fully verified answers to interrogatories of the plaintiffs IIPL and of RANDOLPH were in the actual possession of the plaintiffs' attorneys. Hence, at least with respect to those parties, the Rule 37 Order was improper.

POINT FOUR

THE SUFFICIENCY OF THE ANSWERS TO THE INTERROGATORIES FILED HEREIN ARE DETERMINED UNDER STATE LAW

Rule 33(b) FRCP relates to the scope of interrogatory answers and the use thereof. The Rule reads in part as follows:

> " * * * the answers may be used to the extent permitted by the rules of evidence * * *"

The Rules of Evidence in Federal Courts (as of September 5th,1974) were governed by Rule 43(a)FRCP. (They are now governed by the Federal Rules of Evidence which have similar provisions). Former Rule 43(a) read as follows:

> " * * * All evidence shall be admitted which is admissible * * *under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case,the statute or rule which favors the reception of the evidence governs * * *"

There is no question that the plaintiffs elected to be bound by the answers to the interrogatories served on September 5th,1974. Thus, the only question revolves about the sufficiency of these answers. Since it is merely the evidentiary effect of these answers that is to be considered the State Law provisions of New York (the State in which the District Court was held) are the provisions to be applied. Applying State Law provisions the answers served on September 5th,1974 were sufficient, they concededly were served in time, and Rule 37 sanctions were thus inappropriate.

State Law provisions applied in the Court of general jurisdiction of the State are contained in CPLR 2001 reading as follows:

> " * * At any stage of an action, the court may permit a mistake, defect, or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake,omission, defect or irregularity shall be disregarded.* * *"

The sole objection to the answers to interrogatories of the plaintiff IIPL is that the copy served upon the Appellee's attorney did not have a jurat thereupon. (That the copy was executed by IIPL's secretary SANDS on September 5th,1974 must be conceded since his signature appears on the served copy. The omission of a jurat is not a jurisdiction defect under New York State Law.

In Halpern vs. State Furniture Co.,Inc. 61 NYS(2nd) 618,619 the Court said:

> "* * * Also an omission to place upon the copy petition served the name of the notary, is not a jurisdictional defect.* * *"

In People ex rel Fifth Avenue & 37th Street Corp. vs. Miller, 261 App. Div. 550 the Court said:

> "* * The form for the jurat is entirely blank and the notary failed to affix her signature thereto.* * *
> On the facts disclosed in this record the defect is not a fatal jurisdictional defect depriving the Court of all power to act. * * *"

In Federal National Mortgage Association vs. Graham, 324 NYS(2nd) 827 the Court said:

> "* * * A substantial right of the defendants herein, not being prejudiced (by the failure to place a jurat on the document) the Court may disregard such irregularities * * *"

See also, People vs. Miller, 282 NY 5 where the Court of Appeals of the State of New York held that the failure of a party to sign the verification of a document is not fatal and can be corrected.

Similar State Law provisions apply to verification of court papers. Thus, under New York Law, where parties are united in interest and at least one of them is acquainted with the facts, a single verification is sufficient (CPLR 3020(d). Also, where the matters are within the personal knowledge of the attorney or if none of the parties are in the County where

the attorney has his office, the attorney himself may verify.

Federal Courts, in addition, must apply a State Procedural Rule "which is intimately bound up with the substantive right or obligation being asserted". See Miller vs. Davis, 507 Fed(2nd) 308 (1974) and Szantay vs. Beech Aircraft Corp., 349 Fed(2nd) 60.

Were State procedural rules applied in this case, of course, the copies of answers to interrogatories served on September 5th,1974 would have been clearly sufficient. Since the attorney for the Appellants is being charged by the District Court with, in effect, fraud, it is obvious that, if the answers involved could have been signed by him on September 5th,1974 there could be no fraud.

As of September 5th,1974 the Appellants' attorney had personal knowledge of the facts with respect to the stock holdings of the plaintiffs, their addresses and occupations by reason of his prior receipt of documents signed by such parties setting forth such facts (JA 467,468). Also, it is conceded that the plaintiffs did not reside in the County where the Appellants' Attorney had his office but that they all resided outside of the State of New York.

Interestingly enough, even under Federal Rules, verification of the interrogatory answers of IIPL by Appellants' Attorney would have been proper. Federal Courts have repeatedly held that the General Counsel of an association may verify

interrogatory answers (and, of course, an attorney admitted to the Courts of the State of New York, need not obtain a notary's signature to a document that he signs).

Where counsel to an association signs interrogatory answers his signature is sufficient. See, for example, Fernandez vs. United Fruit Company, 50 FRD 82,86 (1970); Segarra vs. Waterman Steamship Corp., 41 FRD 245,248 (1969), Jones vs. Goldstein, 41 FRD 271,274; Holler vs. General Motors Corp., 3 FRD 296; Cf. Moore, 4 Federal Practice 33.07. In Segarra, supra, the Court held as follows (248).

> "* * Under the amended rule, it has been held that an attorney is the proper person to answer interrogatories on behalf of a corporation and that it is his duty to furnish the sum total of the corporate information.* * *"

The latest case, reiterating the rule is Harbor Shrimp Co.,Inc. vs. Puritan Marine Underwriters,Inc.,21 Fed. Rules Serv.(2nd) 618.

Thus, based on the above, even assuming arguendo service of copies of interrogatory answers on September 5th, 1974 was deliberately made by Appellants' attorney, the copies of answers so served were entirely proper and Rule 37 sanctions were inappropriate.

POINT FIVE

RULE 37 SANCTIONS WERE INAPPROPRIATE IN THIS CASE SINCE THERE WAS NO WILFUL FAILURE TO MAKE DISCOVERY BUT, ON THE CONTRARY, THERE WAS A FRANTIC EFFORT TO COMPLY WITH THE ORDER OF THE COURT

The District Court adopted a simplistic approach in granting Rule 37 sanctions against the plaintiffs in this case. It found that the date of compliance with its Order was September 5th,1974 and that, on that date, fully formal answers to interrogatories had not been submitted. As previously set forth herein, this determination of the District Court was incorrect. However, even if the facts were as found by the District Court, there were no grounds for Rule 37 sanctions.

At the outset, of course, Rule 37 sanctions cannot be applied unless there is an Order of the Court outstanding. See, for example, the latest case of Israel Aircraft Industries,Ltd. vs. Standard Precision, etc. ---Fed(2nd)--- Docket Nos. 76-7591,76-7613,77-7016 and 77-7048 decided by this Court on July 7th,1977.On page 4628 of the slip opinion the Court said:

> " * * * Dismissal under Fed.R.Civ.P.37 is a drastic penalty which should be imposed only in extreme circumstances. The conduct of the plaintiffs herein was not such as to warrant this harsh sanction. Moreover,because subdivision (b) of Rule 37 applies only for 'Failure to comply with order' dismissal under this subdivision was improper

> in the absence of an order. And, because subdivision (d) of Rule 37 applies only where there has been a complete failure to comply with discovery, dismissal was unwarranted because plaintiffs did appear and testify.* * *"

Similar cases setting forth this Rule are Flaks vs. Koegel, 594 Fed(2nd) 702,709 (2 cir. 1974) where the Court said:

> "* * * We conclude that the challenged order below is only sustainable if it has been demonstrated that the defendants' failure to comply was in fact due to willfulness, bad faith or fault and not to an inability to comply.* * *"

To the same effect is Societe Internationale vs. Rogers, 357 US 197; GFI Computer Industries, Inc. vs. Fry, 476 Fed(2nd) 1, Grace vs. Fisher, 355 Fed(2nd) 21 (2 Cir.); SEC vs. Research Automation Corp. 521 Fed(2nd) 585,588, (2 Cir. 1975; Independent Productions Corp. vs. Loews, Inc., 283 Fed(2nd) 730,733 (2 Cir. 1960); Fox vs. Studebaker-Worthington, Inc. 516 Fed(2nd) 989,995 (8 Cir. 1975).

Thus, in considering the propriety of Rule 37 sanctions in the present case we can only proceed from the date of the order of August 16th, 1974. The comments of the District Judge in his opinion as to the passage of time prior to the entry of his Order are immaterial. (Of Course, the District Judge is incorrect in penalizing the plaintiffs for the passage of time prior to August 16th, 1974). The open interrogatories were, in fact, answered prior to the making

of the motion and, since only a single set of interrogatories were propounded, only a single answer was required.

It is also uncontroverted that prior to the making of the August 16th order, the plaintiffs' counsel had already written to the plaintiffs seeking the required information. Promptly after writing to the plaintiffs for the information and upon receipt of the information, answers to the Appellee's interrogatories were prepared. The plaintiffs RANDOLPH and FAGAN mailed their answers to the plaintiffs' attorney within sufficient time for the receipt thereof prior to September 5th,1974. Assuming, arguendo, that they had been received only a few days later and were served later than the requirements in the Order, the record amply demonstrates an inability to comply by reason of distance between Appellants' attorney and Appellants and not any refusal to comply.

In general, where dismissal orders are entered because of a party's refusal to comply with discovery orders, there has been a long period of time where outstanding orders have been ignored. Indeed, even in Flaks vs. Koegel, supra, where dismissal of a complaint under Rule 37 provisions was not sustained, included a Magistrate's Report which, at least indicated a possibility of wilfulness. Thus, on page 709 of the opinion, the following appears:

> " * * It is noted that the report, although finding a failure on the part of the defendants to cooperate with their own counsel,specifically deferred the question of wilfulness to a later date. The report, standing

alone, would therefore not support a finding of any deliberate refusal to respond to interrogatories which would justify the sanctions imposed.* * *"

In the case at Bar, however, there has been no showing of any wilful refusal on the part of the plaintiffs to comply with the Order of the Court requiring further answers to interrogatories. RANDOLPH received a request, let us say, a few days after August 15th,1974. He actually signed the information letter sometime prior to August 29th,1974 (since the information was received by the plaintiffs' attorneys on August 29th,1974). Thus he complied with the request of the attorneys within about 10 days. The proposed answers to the interrogatories were prepared and mailed by plaintiffs' attorneys on August 29th,1974 (JA 302,305,308). Assuming receipt of these draft answers by, let us say, August 31st, 1974 (the earliest that they could have been received by RANDOLPH his mailing of the same on September 3rd,1974 after execution by a Notary Public (three days after receipt) is as reasonable as could be expected.

FAGAN received the draft answers on August 30th,1974 (JA 695) and promptly mailed them to Appellants' attorney. These signed answers were appearently never received by said attorneys. On September 10th,1974 a letter was addressed to FAGAN requesting that the signed answers be returned (JA 469) FAGAN never received this letter. Therefore FAGAN was unaware that he had not complied with the Court's order. It certainly

was not wilful on his part.

SANDS, secretary of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE, signed interrogatory answers on September 5th,1974. Even if he had not the General Counsel for the LEAGUE I.WALTON BADER, could have signed them and, as an attorney, did not have to have the answers notarized. Thus there was no wilful refusal to make discovery on the part of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE.

GARY MICHAEL, of course, was not a plaintiff in this action at the time of the questioned order and had no obligation to sign interrogatory answers. However he did receive the letter of Appellants' attorneys and, on September 16th,1974, sent answers to the Appellants' attorney. In addition, of course, he filed an affidavit (JA 745) wherein he ratified the answers served on September 5th,1974. Even if he were, in fact, a plaintiff, he certainly did not wilfully refuse to make discovery.

Apparently the rationale of the District Court opinion appears to be that it is immaterial as to whether the answers served on September 5th,1974 were correct or not, whether the answers were true or false, whether they could have been signed by the Appellants' attorney or not, but only whether the Appellants' attorney actually had signed copies of interrogatory answers in his actual possession by September 5th,1974. Under the facts and the law cited herein this matter was, of course, immaterial. The conceded facts, of course, are that on September 5th,1974 the information supplied to the

Appellee's attorneys was in all respects correct and that, as of September 5th,1974, all of the plaintiffs in this case had signed answers to interrogatories.

Therefore, based on the applicable law, the grant by the District Court of Rule 37 sanctions is not supportable.

POINT SIX

APPELLANTS' ATTORNEY AND IIPL's SECRETARY SANDS DID NOT MAKE ANY FALSE STATEMENTS OR GIVE ANY FALSE TESTIMONY.

While, based on what has been said before, the factual issues in this case are immaterial, and if, in fact, there was a variance between testimony given by adverse witnesses, such variance would be immaterial. However the District Judge makes much of these irrelevant issues and, in fact, has based a recommendation for disciplinary action against Appellants' attorney on this ground. His grant of attorneys' fees to Appellee also appears to stem from this determination on his part.

Unfortunately the immaterial factual issues were commented on caustically by the District Judge and, as stated by this Court in Israel Aircraft Industries,Ltd. vs. Standard Precision, supra,(slip opinion 4625) as follows:

> " * * The reputations of two established New York Law firms, an internationally known Israeli Corporation and at least five individuals are at stake. They are entitled to have this appeal decided on the merits. * * *"

The District Judge, in effect, has found Appellant IIPL's Secretary SANDS and Appellants' attorney to have given "false testimony" and to have made "false statements". These findings appear to have been influenced by statements attributed to Appellants' attorney at a hearing (where no stenographic record was taken), by letters written by Appellants' attorney to the Court, and by certain testimony of Appellants' attorneys' former secretary BLACKER. Surprisingly, however, the District Judge did not see fit to comment on the admittedly false affidavit given by Appellee's attorney ENO at the commencement of these proceedings or to inquire as to the reason for the unexplained disappearance of a critical piece of evidence in the possession of such attorney (the large envelope in which the IIPL interrogatory answers were mailed).

The District Court considered the letter of September 11th,1974 written to the Court (TR Exhibit B). In that letter Appellants' attorney stated the following:

> " * * *On September 6th,1974 a letter was sent to me by the attorneys for TOUCHE ROSS. I did not personally receive it since I was out of the office. I was told about the receipt of the letter (but not the contents) and believing that Mr. Eno was referring to the answers of RANDOLPH, FAGAN and MICHAEL I told his office that I hoped to receive the signed copies of the original documents and would be mailing them in a few days. I again told his office on September 10,1974 that I hoped to receive the signed copies of the original documents in a few days.* * *"

The letter of September 11th,1974 also stated the following:

> " * * * I further instructed my secretary to send copies of the answers to interrogatories executed by the INDEPENDENT INVESTOR PROTECTIVE LEAGUE to all attorneys for the defendants. I inspected these before they went out, they were properly conformed and there is no question that they were served in time. There does not seem to be any complaint with respect to these answers. * * *"

A hearing on the Rule 37 motion took place on September 20th,1974. This, of course, was fifteen days after the mailing of September 5th,1974 and September 11th,1974 was six days after this mailing. No stenographic record was taken as to what was said at that hearing. The Court, however, took notes which are in the record. These notes have significant entries. (JA 358 , Court Exhibit S-1.

> " * * * Bader said to Sands on September 5th 'if answers come in want you to send answers out * * *"
>
> " * * * knew on 9th that Sands said"
>
> " Did awful lot of investigation"
>
> " Randolph came in on 3:00 mail "

During the hearing, while the Court took notes, Appellee's attorney claims that he did not. However, after the hearing, he claims to have gone to his office and made notes of what was said. These notes are defendant's exhibit S. These notes are significant for their admissions. Thus, in the memorandum, Appellee's attorney stated that the Court pointed out that in the Opposing affidavit of SANDS there was

no discussion of any conversation with Appellants' attorney requesting him to send out answers to adverse attorneys after the original answers were received but that Sands merely stated that he "assumed" that he could send them out. This, of course, is the correct version of the facts testified to at an evidentiary hearing by both Sands and Bader. The ENO memorandum also states that Appellants' attorney stated to the Court that he had left his office at 3PM on September 5th,1974 and that Sands was with him when he had left. This statement, of course, does not appear in the Judge's notes.

In his testimony Appellants' attorney did not, of course, state that Sands was with him when he left his office at 3PM and admitted that the statement in the letter to the effect that his secretary had mailed the documents to Appellee's attorney was incorrect. In acutality Sands mailed the documents and so testified.

The Court also made much of certain other facts. Based on the post office records it was established that the last mail delivery of the day occurred before three PM. The Court concluded, therefore, that since Appellants' attorney had testified that he left the office at 3PM (and relied on the ENO memorandum to establish this fact) Sands could not have received copies of the RANDOLPH answers on September 5th,1974

as had been testified to. The affidavit of the postal carrier LA PORTA clearly covers this point since he probably delivered these answers to the office receptionist of Appellants' attorney prior to 3PM and she, in turn, did not place the documents on Appellants' attorney's desk until later in the day. The Court also, despite the conflict between his notes and the ENO memorandum, held that Appellants' attorney had, in fact, told the Court that he had instructed SANDS to mail out the copies of the letters. This is, of course, in conflict with the testimony at the evidentiary hearing.

The Court also made much of the statement contained in the September 11th letter to the effect that Appellants' attorney had stated that he had told Appellee's attorney that he expected to receive the original answers on both September 9th and September 10th within a few days which is in conflict with the statement to the effect that SANDS had received the RANDOLPH answers on September 5th. This point was covered in the testimony as follows:(JA 185).

> THE COURT: Is the fact that you told Mr. Eno's office on the 9th that you hoped to receive signed copies of the Randolph,Fagan and Michael interrogatories and would be mailing them in a few days?
>
> A (BY MR BADER: No sir. Well, I told him that-- the reason being--I think the language is possibly unfortunate. I had written that in a hurry on the evening of September 11th, and you can understand that I was

terribly upset at this particular point, that something like this had happened. I didn't know how it happened. What I had told Mr. Eno at the time was that since I hadn't been in my office I could not vouch for those answers actually being there until I actually got back to my office, and when I got back to my office I would pick those up, physically see them, and I would be glad to send him copies. That is what I meant when I said that, your Honor.

THE COURT: You said you hoped to receive the signed copies of those interrogatories. Your awareness, as you say, was that you did not know whether you had received them or not.

A. I could not certify at this particular point because I wasn't in my office. All I had was a telephone call from Mr. Sands. Now at that particular point how could I certify to Mr. Eno that those things were there when at that point I hadn't seen them.

Had the letter stated precisely that " I hoped to physically receive the signed copies of the original documents and would be mailing them within a few days" the letter would have been entirely accurate.

More interesting, however, is the confirmation of the telephone conversations of September 9th and 10th from the Appellee's attorneys' records. His own secretary recorded the conversations thus: (TR Exhibit H).

" * * * Rec'd your letter about Teleprompter case. Will send you photocopies of original interrogatory a within next few days.* * *"

The September 10th conversation is recorded as follows:(TR Exhibit J)

> " Mr. Bader called, Re interrogatories. He will be sending photocopies of the original answers. He extends his apologies, He will extend your time for answer for 2 1/2 or three weeks.* * *"

The Court further found that the answers of the IIPL were not signed by Sands on September 5th,1974. It based this on the testimony of DOROTHY BLACKER. She, of course, did not so testify. Her testimony can be summarized as follows(JA 119)

> Q. You don't remember?
>
> A. September 5th doesn't mean a thing to me, nothing at all.

(JA 141)THE COURT: Very good. I assume it (placing an incorrect date on a document)would be because somebody had given you instructions to date the instrument some other date?

> A. That would be right, Yes.
>
> Q. Do you have any recollection of being instructed to date Exhibit A upon some other date than the date upon which you typed it?
>
> A. No your Honor.

(JA 140) THE COURT: Do you customarily put upon a piece of paper that you type the date upon which you weren't typing it.

> A. Very, very rarely.

Contrasting with this testimony is the testimony of BADER as follows:(JA 193-194)

> THE WITNESS; All right, I want to make

a statement to the court with respect to the testimony yesterday of Mrs. Blacker.

There is a September 5th date on the answers to interrogatories signed by Mr. Sands of the Independent Investor Protective League. With respect to that my best recollection is that I requested Mrs. Blacker to draw those interrogatory answers on the 4th, and that I asked her to put the 5th date in the answers because of the fact that Mr. Sands was expected in my office the next day to sign them.

Testimony also appears of SANDS at JA 67-68 as follows:

Q. Will you tell me what transpired (on September 5th,1974)

A. Well, we talked a little bit about Teleprompter and he said he had to have these ...gave me the papers to sign on behalf of the League, which I did.* * *"

Testimony of BADER appears at JA 6,7) as follows:

Q. The original of these answers, were they signed by Mr. Sands?

A. Yes, sir.

Q. Were you the Notary Public who took his signature?

A. Yes, sir.

Before discussing the clear lack of evidence of the factual findings of the District Court concerning "false statements" and "false testimony" on the part of BADER and SANDS the evidentiary admissibility of (1) the Judge's notes, (2) the alleged "testimony" of BADER at the hearing of September 20th,1974 and (3) the ENO memorandum (TR Exhibit S), will now be considered.

The probative value of Judge's notes is very rarely considered by a Court. Generally, of course, a Judge's notes are inviolate and are for his use alone. They are neither usable or citable by any party to litigation. The Rule, of course, is a salutory one. If Judge's notes can be utilized as evidence then the Judge making these notes would be a witness. As such, of course, he would be disqualified either under former 28 USC 455 (prior to December 5,1974) or, at the present time, under Federal Rules of Evidence 605 (after December 5th,1974). This Court has even refused to permit the use of notes of a deceased judge. In Deep Sea Tankers vs. The Long Branch 242 Fed(2nd) 433, 434 (2 Cir.) holding as follows:

> "* * * We hold that Judge Goddard's notes are not part of 'the record made at the trial' of the case before him.* * *
>
> It does not appear whether or not Judge Clancy read them, but we hold this not to be material,as they were no more than private,preliminary observations such as are commonly made by many trial judges,* * *"
>
> When a judge dies and the case is turned over to another judge for decision on the basis of the trial record already made, the judge must decide all questions, including those relating to the credibility of witnesses, from the cold record before him and without reference to any notes or memoranda made for his private use by the judge before whom the testimony was taken * * *"

Here, of course, without a stenographic transcript, the District Judge relied on notes made by him on an argument of a motion to make factual findings. An appellate court cannot review a decision utilizing the judge's notes any more than the Appellate Court could in Deep Sea. The use of such notes is reversible error.

The second problem involves the Court's holding that, on the argument of a Rule 37 motion, the statements made by Appellants' attorney were "testimony". This is, of course, just not so. To utilize statements made in open court against one making them there must be a stenographic transcript. Otherwise it would be simple for a District Judge to misunderstand what a party or attorney has stated to the Court or, at worst, it could result in the memorialization of "testimony" which never occurred. A transcript was thus necessary to bind Appellants' attorney for statements allegedly made on the argument of the September 20th, 1974 motion. See, for example, In Re Colonial Realty Investment Co., 516 Fed(2nd) 154; US vs. Perkins, 498 Fed(2nd) 1054 and Grav vs. Proctor and Gamble Co., 32 FRD 199.

The use of an attorneys' remarks on the hearing of a motion as "testimony" would also constitute a violation of The Code of Professional Responsibility EC 5-9 which reads as follows:

> "Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness of an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness.* * *An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent * * *"

Thus, if the Court should be sustained in holding that statements made at a hearing by an attorney are "testimony" then no attorney could ever argue a motion or participate in any case. The record, on a motion, are the papers submitted and not the argument. The action of the Appellee's attorney in taking notes of purportedly what was said at the hearing of the motion, and utilizing these notes for the purpose of impeachment of adverse counsel who he himself has called as a witness, is improper practice and should not be permitted by this Court.

In further points Appellants will argue that Appellee's attorney violated eithical considerations by testifying as a witness before Judge Owen but this is not germane to the present point.

Having discussed the sole disputed facts upon which the District Judge made his findings of "false statements" and "false testimony" comments can now be made. Appellants respectfully point out that there is never a trial of factual issues that does not involve conflicting testimony. In many trials, of course (probably in most) the witnesses do not consciously lie

but merely have different recollections of the events. The undersigned recalls an experiment conducted before a college law class where a staged attack was made on the professor holding the class. The "script" was carefully rehearsed beforehand so that there would be no mistake as to what had occurred. Nevertheless there was not one student who could give an accurate account of what had occurred.

In addition, of course, certain events become fixed in recollection and certain others do not. The undersigned would be willing to state categorically that if any of the members of the panel of this Court hearing this appeal would be asked what they had for dinner a week ago they might very well not know. In connection with the events leading up to the decision of the District Court in this matter the question as to when interrogatory answers were received was considered of small importance. There has been no showing that any of the answers sent on September 5th,1974 were incorrect in any material particular. Merely because the District Court found the factual circumstances to be different than testified to by Appellants or their attorney and found the version testified to by Appellee's attorney does not make Appellants or their attorney guilty of making of "false statements" or giving "false testimony".

Thus the findings by the District Court relating to such "false statements" and "false testimony" cannot be sustained.

Finally, of course, none of the disputed factual

issues were material to the determination of the Rule 37 motion.

POINT SEVEN

APPELLEE IS BARRED FROM OBTAINING RELIEF IN THIS PROCEEDING BECAUSE OF THE FILING BY HIS ATTORNEY ENO OF AN ADMITTEDLY FALSE AFFIDAVIT, HAVING FILED A MISLEADING AFFIDAVIT AND HAVING FAILED TO EXPLAIN THE DISAPPEARANCE OF A VITAL ITEM OF EVIDENCE

The record in this action shows that the attorney for the Appellee, LAWRENCE R. ENO, filed an affidavit which was admittedly false in his motion for Rule 37 relief. The affidavit is quoted on page 15 of this brief supra. At the "tail end" of the hearings Appellee's attorney finally admitted the falsity of the document after accusing the Appellants' attorney, on the basis of this false affidavit of fraud. Thereafter Appellants proved, by the affidavit of Appellant RANDOLPH, that he had mailed the signed interrogatory answers in sufficient time for them to have reached the office of Appellants' attorney by September 5th, 1974. To counter this Appellee's attorney submitted the following misleading affidavit:

> " * * * My office has checked with the post-office department and has been advised that an air mail letter deposited in a letter box in San Diego California after 5:30 PM on September 3rd,1974 would not have been delivered in New York on September 5th,1974. (emphasis supplied).

RANDOLPH, of course, had submitted affidavit evidence to the effect that the answers were mailed about 12

noon on September 5th,1974 and from a post-office in San Diego California.

In the same affidavit Appellee's attorney swore as follows:

> " * * On the argument before the Court on September 20th,1974 Mr. Bader made no statement that Mr. Sands had been in his office on September 9th,1974.* * *"

Contrast this statement with the Court's own notes which read:

> "knew on 9th that Sands said"

Rule 37 provides for a withholding of expenses, even if a motion under the Rule is successful if:

> " * * * other circumstances make an award of expenses unjust* * *"

Where Appellee's attorney has made one admittedly false affidavit, one affidavit which is prima facie false and one affidavit which contains misleading statements an award of attorneys' fees and expenses, even if otherwise justified, would not be warranted in this case.

The failure to award attorneys' fees in this case could also be justified under the doctrine of "unclean hands" under the rationale of Kama Ripa Music,Inc. vs. Schekuyck, 510 Fed.(2nd) 837; Irving vs. Gray, 479 Fed(2nd) 20 and Jack Winter Inc. vs. Koratron Co.,Inc. 375 Fed. Sup. I

Appellee's attorney also failed to explain the

disappearance of the large envelope in which the answers of the IIPL were mailed. It would, of course, have been highly embarrassing for Appellee's attorney to suddenly find that two envelopes were in his possession when he claimed only a single mailing in his affidavit. What better way of disposing of this problem than eliminating the second envelope.

POINT EIGHT

SINCE APPELLEE'S ATTORNEY APPEARED AS A VOLUNTARY WITNESS AT HEARINGS BEFORE JUDGE OWEN HE IS DISQUALIFIED FROM REPRESENTATION OF APPELLEE AND HIS FIRM IS LIKEWISE DISQUALIFIED UNDER DR 5-102 OF THE JUDICIARY LAW OF THE STATE OF NEW YORK

Appellants' attorney BADER appeared as an "involuntary witness" at hearings before Judge Owen. On the other hand Appellee's attorney ENO (who compelled BADER's appearance at the hearings) appeared as a voluntary witness therein. As such he becomes disqualified from representing the Appellee. This is set forth in DR 5-102 of the Judiciary Law of the State of New York which reads as follows:

> "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation
> * * *"

The qualifications of this rule are not believed to be applicable to this matter.

In the present case the testimony of ENO was relied upon by the District Court. Since ENO was also the attorney for the defendant TOUCHE ROSS and had a personal interest in obtaining a dismissal of the Complaint the reasons for the disability of an attorney from testifying as a witness are strong in this case. The present case gives ample support for the Rule involved.

Since ENO and his firm are disqualified from representation of the defendant TOUCHE ROSS no fees and expenses incurred by him can be paid in this case.

POINT NINE

THERE HAS BEEN NO FRAUD COMMITTED EITHER ON THE COURT OR ON OPPOSING COUNSEL

The basic rationale for the decision of the Court in this case appears to be that the plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE and its General Counsel I.WAATON BADER committed a"fraud" on both the Court and upon adverse counsel by representing that certain interrogatory answers were executed by the plaintiffs when, in fact, they were not. A consideration of the facts in this case will show that the findings are unsupported.

"Fraud", of course, requires the proof of the following elements:

1. Misrepresentation.

2. Of material fact

3. Reliance on the part of the party defrauded

4. "Scienter"

5. Damages

In the case at bar, none of the elements involved are present.

In order to prove "fraud" all of the above elements must be shown, omission of even one of these elements is fatal.

The above elements will now be discussed. Firstly, there was no misrepresentation. On September 5th,1974 answers to interrogatories in the precise form sent to the Appellee's attorneys were executed by the plaintiffs IIPL, RANDOLPH and FAGAN who were all of the plaintiffs in the case. It is conceded that, on September 3rd,1974 RANDOLPH executed these answers. It must also be conceded, based on the FAGAN affidavit, that FAGAN had also, prior to that date, executed proper answers to interrogatories. SANDS, Secretary of the IIPL, had actually signed the service copy of these answers which were mailed on September 5th,1974. Furthermore, in order to properly make the record complete, both IIPL, RANDOLPH and FAGAN have executed "nunc pro tunc" Powers of Attorney to the Appellants' attorney fully ratifying the answers served on September 5th,1974. There is no question as to the information contained in these answers and this information is correct to the knowledge, at that time, of the parties involved.

The answers of the said GARY MICHAEL are slightly different. On September 5th,1974 this individual was not a party to this action and had no obligation to answer interrogatories. However, for the purpose of this point, it will be assumed arguendo that he had such obligation. There was a small variance between the answers served on September 5th,1974 and the answered executed by him on September 16th, 1974. This variance was immaterial as will be dissussed infra. However GARY MICHAEL has ratified the answers of September 5th,1974 (JA 745) and, of course, ratification of an act of an agent by a principal gives the agent full retroactive authority to perform any act. See, for example,Pullen vs. Dale, 109 Fed(2nd) 538; Equity Mutual Insurance Company vs. General Casualty of America, 139 Fed(2nd) 723; Davies vs. Lahann, 145 Fed.(2nd) 656 and Standard Oil Company of Texas vs. Manley, 178 Fed.(2nd) 136.

No material fact was misrepresented. The information contained in the answers of RANDOLPH, FAGAN and IIPL was identical in the copies served on September 5th,1974 with the executed answers. The variation in the MICHAEL answers (assuming arguendo that MICHAEL had any obligation to answer interrogatories involved immaterial matters. MICHAEL had moved from his prior residence and, therefore, in the September 16th,1974 answers gave his new residence. This, off course is immaterial. MICHAEL also, in his September 16th,1974 answers gave the "trade date" of the stock while in the preliminary report sent to Appellants'

he gave the "settlement date". Both dates are equally correct as an answer to the interrogatory which read:

> "* * the date when he first purchased shares of Teleprompter, (ii) the number of shares purchased on that date,* * "

Even where there is a misrepresentation of a material fact, of course, "fraud" cannot be established unless there is "reliance". In the case at Bar, as of September 11th, 1974 and prior to the making of the Rule 37 motion by the Appellee's attorney, all facts in the matter were fully disclosed to Appellee's attorney. Thus no "reliance" is shown.

The next element is "scienter". Obviously, from the record, since Appellants' attorney was concededly out of New York on September 6th, (a Friday) and the following Monday (September 9th)and Tuesday(September 10th) and since full disclosure was made on September 11th no "scienter" could be shown. It is interesting, however, to see the manner in which this Court treats "scienter" even where there has been a clear misrepresentation. In Israel Aircraft Industries,Ltd. vs. Standard Precision, supra, this Court on pages 4625 and 4626 of the slip opinion held as follows:

> "* * *We have made such an examination and have painstakingly reviewed the entire record. Having done so, we conclude that neither appellants nor their attorneys were guilty of a fraud upon the Court. There were misunderstandings, lack of communication, and, in some instances carelessness. However there was no intentional fraud. * * *"

Israel Aircraft is, of course, far stronger in fraud elements than the case at Bar. In that case there was a failure to disclose a material fact (releases given to three employees) which had a material bearing on the defendants' defense of the action. In the case at Bar there is no question that that the information given by the Appellants' attorney on September 5th, 1974 was entirely accurate and the only question was compliance with the formal elements of signature and jurat.

The final question is damages. Appellants point out that, prior to the present appeal, and prior to the vacation by Judge MacMahon of his signature to the Notices of Voluntary Dismissal, all of the formalities with respect to the said interrogatory answers were complied with. Apparently the District Judge used the Rule 37 award made in this case to "punish" the Appellants, and particularly their attorney for what he considered a breach of professional ethics. This Court, however, has specifically held that such questions are not for the Court but for the Grievance Committee of the Bar Association involved. W.T. Grant vs. Haines, 531 Fed(2nd) 671,677 (2 Cir. 1976) is the latest pronouncement of this Court on this point. The Court held as follows:

> "* * * The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it * * * If the Liebman firm is guilty of professional misconduct * * * the appropriate forum is the Grievance Committee of the Bar Association.* * *"

A similar finding was made in Lefrak vs. Arabian American Oil Company, 527 Fed(2nd) 1141 (2nd Cir.).

This Court has even gone further and held that, where there is a question of professional ethics which does have an effect on a trial before the Court, a Court may not make findings relative to the professional misconduct of an attorney without holding a hearing in the matter and specifically giving the attorney notice of the charges. This was held in Korn vs. Franchard Corporation, 456 Fed(2nd) 1206 (2 Cir. 1972) on page 1208 of the opinion as follows:

> * * *Moreover, we think that the court's opinion should not have condemmed the attorney's conduct without affording him a hearing on the propriety of his activities;* * *"

The sole notice received by Appellants' attorney with respect to the "hearing" held by the Court was solely with respect to the receipt in his office on September 5th,1974 of the original RANDOLPH interrogatory answers and the matters with respect to claimed professional misconduct on his part (specifically found by the District Judge not to be "germane" to the Rule 37 proceedings) was contained in the Court's opinion and Order of January 9th,1976.

POINT TEN

THE DISTRICT COURT HAD NO JURISDICTION TO AWARD ATTORNEYS FEES AND EXPENSES AGAINST APPELLANTS IIPL AND THEIR ATTORNEY SINCE PRIOR TO THE DATE OF THE AWARD NOTICES OF VOLUNTARY DISMISSAL WERE FILED WITH THE CLERK OF THE COURT

Had the present action not been commenced as a Class Action there would be no question that the filing of the Notices of Voluntary Dismissal by the plaintiffs with the Clerk of the District Court would have terminated the action. The law on this point is clear and pendency of Rule 37 proceedings cannot prevent such action from being taken by a party.

Scam Instrument Corp. vs. Control Data Corp, 458 Fed. (2nd) 885 sets forth the general rule. On page 888 of the opinion the Court held as follows:

> " * * * If Scam was entitled to 41(a)(1)(i) procedure its voluntary dismissal automatically terminated the action upon filing of the dismissal with the clerk, No order of court was required * * *"

In Miller vs. Reddin, 422 Fed(2nd) 1264 a District Judge instructed the Clerk of the Court not to accept a Notice of Voluntary Dismissal since he intended to take action on the merits in the suit. On appeal, however, the Court of Appeals reversed, holding as follows: (pg.1266)

> " * * * The case is remanded to the district court. The clerk of the district court is instructed to file the voluntary dismissal heretofore lodged with the clerk, whereupon the action below will be by such act, dismissed * * *"

In the present case no answer had been filed by the defendants prior to the filing of the Notices of Voluntary Dismissal so that this proceedure was authorized by FRCP 41(a)(1)(i).

On the other hand, a Class Action, cannot be dismissed or compromised without an Order of the Court (Rule 23(e) FRCP. (While an Order was entered in this case it has been subsequently vacated, and while the propriety of the vacatur will be argued the undersigned submits that it is not necessary to reach this point here.

The Supreme Court of the United States, so held in the recent case of Baxter vs. Palmigiano, 95 Sup. Ct. 1551 ---US---. This case holds that where an action is not certified as a Class Action by the Court (as the instant action was not at the time of the filing of the Notices of Voluntary Dismissal) it is not a Class Action. The Supreme Court, on page 1554 of its opinion, in a footnote, held as follows:

> " * * * Without such certification and identification of the Class, the action is not properly a Class Action.* * *"

The Supreme Court also cited, with approval, Board of School Commissioners of the City of Indianapolis vs. Jacobs, 95 Sup. Ct. 848,850 (1975) where the following holding was made:

> " * * * Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the district court to vacate its judgment and to dismiss the complaint.* * *"

Furthermore, a Notice of Voluntary Dismissal in this case by these plaintiffs would not prejudice the absent Class Members. There were, at the time, six other Class Actions pending making similar allegations. Also, of course, the Rule 37 action taken by the District Court was made specifically inapplicable to the pending Class Action involving the other six cases (JA 958), the consolidated complaint filed by lead counsel did not include the claims of the plaintiffs in this action and, of course, dismissal of a complaint under Rule 37 grounds is not applicable to other Class Members.

The latter point was made in Papilsky vs. Berndt, 466 Fed(2nd) 251 (1972) where the Court, on page 256 of the opinion, held as follows:

> " * * *We hold that, when notice of a proposed dismissal of a stockholder's deriviative suit for failure to amswer interrogatories is not given to non party stockholders, the judgment of dismissal does not bar an identical cause of action asserted by a different stockholder in a subsequent derivative suit.* * *"

By analogy, of course, this holding would also apply to the dismissal of Class Actions pursuant to Rule 37 FRCP and thus would not constitute a "collusive dismissal" of Class litigation which Rule 23(e) FRCP was designed to prevent.

Appellants will now discuss the subsequent vacatur by Judge MacMahon of his "Ordered" notation on the Notices of Voluntary Dismissal heretofore filed. If the above discussion

is followed by this Court such vacatur becomes moot. However, in any event, once an action has been dismissed, either by stipulation or by Court Order, a Court cannot, over objection by a party, reinstate the action. Hence the vacatur by Judge MacMahon of his prior "so ordered" notations on the Notices of Voluntary Dismissal are ineffective.

POINT ELEVEN

THE APPELLEE'S ATTORNEY FAILED TO DISCLOSE TO APPELLANTS' ATTORNEY HIS PRIOR PERSONAL ACQUAINTANCE WITH THE DISTRICT JUDGE NOR HIS PRIOR SERVICE ON THE JUDICIARY COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK WHICH PASSED ON THE QUALIFICATIONS OF THE DISTRICT JUDGE SHORTLY PRIOR TO HIS APPOINTMENT. SUCH FAILURE TO DISCLOSE BARS RELIEF TO APPELLEE AND SHOULD CAUSE THE DISTRICT JUDGE TO RECUSE HIMSELF IN THIS MATTER

Fortuitously, and only by reason of an annonymous telephone call received by Appellants' attorney subsequent to the Order and Opinion of the Court of January 9th,1976, and by reason of correspondence had between Appellants' and Appellee's attorneys, it was disclosed that Appellee's attorney, a witness at the hearings before the District Court, and whose testimony was accepted by the District Judge over contrary testimony by Appellant's IIPL secretary SANDS and its attorney BADER, was personally acquainted with the District Judge. While the specifics of such acquaintance were not disclosed (and have not been disclosed to this date) nor the specifics of any acquaintance of the District Judge by any members of the firm representing Appellee, the following was, at least, disclosed.

1. Within a year from the date of the hearings held by the District Judge in this matter, Appellee's attorney ENO had served as a member of the Judiciary Committee of the Association of the Bar of the City of New York, which had reported on the qualifications of the District Judge for appointment to the Bench and before whom the District Judge had appeared for an interview.

2. Appellee's attorney ENO and the District Judge had met at the opera and at at least one social function.

The failure on the part of Appellee's attorney to disclose these facts seriously prejudiced the Appellants. Had these facts been promptly disclosed Appellants would have promptly made an application to recuse the District Judge. This application, of course, may or may not have been successful, However, at least, the application could have been made and, if denied, could have been reviewed by writ of mandamus to this Court. (Davis vs. Board of School Commissioners of Mobile County, 517 Fed(2nd) 1044, 1051 (1975). By concealing these facts and hoping that they would not be disclosed Appellee's attorney permitted the District Judge to make findings and, obviously, could not disqualify himself after such findings were made on the basis of facts that Appellee's attorney should have disclosed.

Based upon the recent decisional law of this Court, and 28 USC 455 as well as the prior 28 USC 455 the District Judge should have disqualified himself in this matter and thus any proceedings held before him based upon facts unknown to

Appellants at that time, are void.

Prior section 455 of Title 28 of the United States Code (in force in November 1974) read as follows:

> " * * * Any justice or judge of the United States shall disqualify himself in any case in which he * * * has been a material witness * * *"

This section's language now appears in Rule 605 of the Federal Rules of Evidence reading as follows:

> " * * * The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve this point. * * *"

(The section above as effective January 2nd,1975)

28 US 455, as amended requires recusal of a District Judge:

> " * * * in any proceeding in which his impartiality might reasonably be questioned.* * *"

Were the District Judge, in this case, a juror, he would be forthwith disqualified for cause merely upon the ground that he was personally acquainted with Appellee's Attorney (who was to be a witness at the hearing involved). This principle is practically "hornbook law". However there are cases supporting this principle. ~~Some~~ One of the cases ~~are~~ is as follows. In United States vs Bailey 468 Fed(2nd) 652,658 the Court said:

> "* * * We can find nothing abusive or prejudicial in the excusal of jurors admittedly acquainted,regardless how remotely, with one of the parties to the proceedings.* * *"

Where a District Judge is acting as a "juror" and passing on disputed factual issues, it is even more important to assure his complete impartiality. Any factual determinations made by him, if supported by any probative evidence, are binding on an Appellate Court. Hence, had the facts with respect to the acquaintance of Appellee's attorney with the District Judge been brought to Appellants'attention prior to the making of the decision complained of herein, a prompt application to recuse the District Judge would have been made. (See affidavits of MAHON and RANDOLPH (JA 934, 936).

In such event the District Judge might have recused himself from the case. However, in fairness to the District Judge, he was placed in a difficult position by being asked to recuse himself after he made the decision complained of herein. However the Rules of Law promulgated by this Court leave him no alternative.

The most recent case illustrating this Court's attitude toward recuals of a District Judge in any case where his impartiality can even remotely be questioned is In Re Continental Vending Machine Company, 543 Fed(2nd) 986,996 (2nd Cir. 1976) where the Court said:

> " * * * Under the circumstances, while Judge Mishler is not required to disqualify himself, we suggest that he might desire to do so in the interest of maintaining the appearance of observing the highest standards of fairness, for which he has always been respected by Bench and Bar alike. * * *"

It is noted, of course, that in Continental Vending Judge Mishler did not have to pass on the competence and veracity of his own testimony. However, in the instant case, Judge Owen utlized his notes as evidence and utilized a set of notes made by Appellee's attorney as constituting evidence on what transpired before him. Thus he did pass on the competency and veracity of his own testimony.

In Winters vs. Travia 495 Fed(2nd) 839 (1974) this court suggested recusal of Judge Travia even though technically such action was not required.

Recusal of the District Judge in this case is further required in order to provide for the appearance of justice. In a recent editorial in U.S. News and World Report, page 68, August 1st,1977, Editor Marvin Stone, in commenting upon ethics of Governmental Officials had this to say:

> " * * * While innocent until proven guilty is the first precept of law, society has demanded--and properly should demand--of its public servants conduct above the appearance of wrongdoing. That precept dates from the days of Socrates to the time of Caesar's wife until the present.* * *"

About a year ago, the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. The situation involved in this point can clearly be seen as one of the causes of such dissatisfaction.

POINT TWELVE

SINCE FACTUAL ISSUES WERE INVOLVED HEREIN A JURY TRIAL WAS REQUIRED BY THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The seventh amendment to the constitution of the United States reads as follows:

> " In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

A jury was duly demanded in this case and, the hearing held by the Court involved factual issues. Constitutionally, therefore Appellants require a jury trial on such issues (particularly by reason of the Court's finding of "false statements" and "false testimony" claimed to have been made by Appellants and their attorney. Thus, in any case where a substantial penalty is to be imposed by a Court, a jury trial is required. In United States vs. J.B. Williams Company,Inc. 498 Fed(2nd) 414 (2 Cir. 1974) this Court said (422).

> "* * * There can be no doubt that in general there is a right of jury trial when the United States sues to collect a penalty, even through the statute is silent on the right of jury trial. * * *"

Even in cases of Criminal contempt, a Jury Trial is now required. In Bloom vs. Illinois, 391 US 194,198 the Supreme Court held as follows:

> " * * * Our deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject

to the jury trial provisions of the constitution * * *"

In Curtis vs. Loether, 415 US 189,193, statutory penalties (including, by analogy, Rule 37 sanctions) also require a jury trial, the Court holding as follows:

" * * * Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes * * *"

See also, Dairy Queen,Inc. vs. Wood, 369 US 469; Hepner vs. United States, 213 US 103; Fleitman vs. Welsbach Street Lighting Co., 240 US 27 ; Atchinson,Topeka & Santa Fe Ry vs. United States, 178 Fed. 12; Porter vs. Warner Holding Co., 328 US 395; Texas and Pacific RR Co. vs. Rigsby, 241 US 33 and Arnstein vs. Porter, 154 Fed(2nd) 464 (2nd Cir.)

Appellee will undoubtedly argue that, by proceeding before Judge Owen without a jury, Appellants waived their right to jury trial even if they had such right in the first place. This Court, however, in Heyman vs. Kline, 456 Fed.(2nd) 123 (2nd Cir. 1972) has held to the contrary. On page 129 of the opinion the Court held as follows:

" * * * The right to jury trial is too important * * * and the usual procedure for waiver of the right too clearly set out by the Civil Rules to find a knowing and voluntary relinquishment of the right in a doubtful situation * * *"

See also Ross vs. Bernhard, 396 US 531 and Beacon Theatres, Inc. vs. Westover, 359 US 500.

Thus, even if the determination of the District Court were otherwise proper, it would be void for failing to have the factualissues tried before a jury. Also, quite obviously, had Appellants known of the facts with respect to the acquaintance of Judge Owen with Appellee's attorney, a Jury Trial would have been insisted upon and the failure to disclose the significant facts obviates a waiver problem.

POINT THIRTEEN

THE FIXATION OF ATTORNEYS FEES IN THIS CASE, EVEN IF OTHERWISE AUTHORIZED, WOULD HAVE REQUIRED AN EVIDENTIARY HEARING

This Court has flatly stated, on at least one occasion, that attorneys' fees cannot be awarded, over opposition, without an evidentiary hearing. City ofDetroit vs. Grinnell Corp., 495 Fed(2nd) 448 (2nd Circuit 1974).

Here the District Court permitted Appellee's attorney to submit an affidavit, Appellants' attorney submitted a counter affidavit controverting the allegations of the Appellee's attorneys' affidavit. The counter-affidavit was responded to by Appellee's attorney and, on the basis of these affidavits, and without permitting either an evidentiary hearing or an examination of the Appellee and its attorney prior to the hearing, granted over $8,000 in fees and expenses against Appellant IIPL and its counsel.

No evidence was introduced regarding the necessity for the legal services performed by Appellee's attorney, whether the services were reasonable or necessary under the facts of this case, whether they were authorized by Appellee, or whether they were reasonable in amount. Furthermore Appellants did not have the right of cross-examination with respect to such services.

In addition, of course, in view of the controlling law, since a jury demand was filed in this case, there is a serious question as to whether these fees and expenses should be fixed not by the Court but by a jury.

POINT FOURTEEN

THE FACTUAL DISPUTES IN THIS CASE ARE IMMATERIAL AND THUS THE HEARINGS HELD BY THE DISTRICT JUDGE ARE A NULLITY

There are, of course, in this action, factual disputes resolving principally around conversations had between Appellants' attorney BADER and Appellee's attorney ENO. There is also a factual dispute as to what was said at the argument of the motion before the District Court on September 20th,1974 and interpretation of statements in a letter written to the Court.

These factual issues, of course, based on what has been stated before, are immaterial to this proceeding. As a matter of undisputed fact plaintiffs complied with the Order involved on September 5th, 1974 and, in any event, did not wilfully refuse to make discovery. Thus the factual disputes as to "who did what to whom and who said what to whom" are immaterial and there was no need to hold a hearing. Since the hearing was void ab initio the factual disputes should be disregarded.

There is, of course, another and more compelling reason for disregarding the factual disputes. The attorneys for the parties are placed in the unseemly position of being witnesses and arguing their own credibility before the Court. The Disciplinary Rules cited herein, supra, were promulgated to avoid such an unseemly situation. Considering the factual disputes in this case would cause the Appellee's attorney and his law firm from being disqualified in this case. A Court should not, it is submitted, conduct proceedings which could lead to an attorneys disqualification for participating in the proceedings.

CONCLUSION

THE DETERMINATION OF THE DISTRICT COURT DISMISSING THE COMPLAINT AGAINST THE PLAINTIFFS IIPL, RANDOLPH AND FAGAN AND AGAINST GARY MICHAEL WITH PREJUDICE AND AWARDING ATTORNEYS' FEES AND EXPENSES AGAINST THE PLAINTIFFS IIPL AND THEIR

ATTORNEY SHOULD BE IN ALL RESPECTS REVERSED.

Respectfully submitted

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by D. Susser

8 Aug 1977

2:55 p.m.